

Stephen Barry Fine and Leesa Ariel Brookman Fine
DEBTOR

BK-N-10-54848-gwz
BNKR. NO. MOTION NO.

Wells Fargo Bank, N.A. also known as Wachovia Mortgage, a
division of Wells Fargo Bank, N.A. and formerly known as
Wachovia Mortgage FSB
MOVANT

CHAPTER: 7

Certification of Attempt to Resolve the Matter Without Court Action:

Moving counsel hereby certifies that pursuant to the requirements of LR 4001(a)(2), an attempt has been made to resolve the matter without court action, but movant has been unable to do so.

Date: January 31, 2011

Signature: Matthew M. McArthur

Attorney for Movant

PROPERTY INVOLVED IN THIS MOTION: 1966 Arabian Ln, Gardnerville, Nevada 89410-7845

NOTICE SERVED ON: DEBTOR(S) _____;
DEBTOR'S(S)' COUNSEL _____; TRUSTEE _____

DATE OF SERVICE: _____

MOVING PARTY'S CONTENTIONS:

The EXTENT and PRIORITY of LIENS:

1st: \$410,818.87

2nd: _____

3rd: _____

4th: _____

Other: _____

Total Encumbrances: \$410,818.87

APPRAISAL or OPINION as to VALUE: \$270,000.00

DEBTOR'S CONTENTIONS:

The EXTENT and PRIORITY of LIENS:

1st: \$ _____

2nd: _____

3rd: _____

4th: _____

Other: _____

Total Encumbrances: \$ _____

APPRAISAL or OPINION as to VALUE: _____

**TERMS OF MOVANT'S CONTRACT
WITH THE DEBTOR**

Amount of Note: \$385,000.00

Interest Rate: 2.995%

Duration: 30 years

Payment per Month: \$1,997.30

Date of Default: October 15, 2009

Amount in Arrears: \$33,271.24

Date of Notice of Default (if recorded): _____

SPECIAL CIRCUMSTANCES: Debtors intend to surrender the Real Property.

I hereby certify that an attempt has been made to confer with debtor(s) or debtor(s)' counsel, that more than two (2) business days have expired, and that after sincere effort to do so, counsel has been unable to resolve this matter without court action.

SUBMITTED BY: /s/ MATTHEW M. MCARTHUR

4375 Jutland Drive, Suite 200

P.O. Box 17933

San Diego, CA 92177-0933

(858) 750-7600

NV Bar # 11649

**DEBTOR'S OFFER OF "ADEQUATE
PROTECTION"
FOR MOVANT**

SPECIAL CIRCUMSTANCES:

SUBMITTED BY:

Signature: _____

1 PITE DUNCAN, LLP
EDDIE R. JIMENEZ (NV Bar #10376)
2 MATTHEW M. MCARTHUR (NV Bar #11649)
ACE VAN PATTEN (NV Bar #11731)
3 701 Bridger Avenue, Suite 700
Las Vegas, Nevada 89101
4 Telephone: (858) 750-7600
Facsimile: (619) 590-1385
5 E-mail: ecfnvb@piteduncan.com

6 MAILING ADDRESS:
4375 Jutland Drive, Suite 200
7 P.O. Box 17933
San Diego, California 92177-0933

8 Attorneys for Secured Creditor WELLS FARGO BANK, N.A. ALSO KNOWN AS
9 WACHOVIA MORTGAGE, A DIVISION OF WELLS FARGO BANK, N.A.
AND FORMERLY KNOWN AS WACHOVIA MORTGAGE FSB

10 UNITED STATES BANKRUPTCY COURT

11 DISTRICT OF NEVADA

12 In re

13 STEPHEN BARRY FINE AND LEESA
14 ARIEL BROOKMAN FINE,

15 Debtor(s).

Bankruptcy Case No. BK-N-10-54848-gwz
Chapter 7

WELLS FARGO BANK, N.A. ALSO
KNOWN AS WACHOVIA MORTGAGE,
A DIVISION OF WELLS FARGO BANK,
N.A, AND FORMERLY KNOWN AS
WACHOVIA MORTGAGE FSB'S
MOTION FOR RELIEF FROM
AUTOMATIC STAY
(11 U.S.C. § 362 and Bankruptcy Rule 4001)

Date: March 1, 2011
Time: 10:00 A.M.

16 Wells Fargo Bank, N.A. also known as Wachovia Mortgage, a division of Wells Fargo Bank,
17 N.A, and formerly known as Wachovia Mortgage FSB¹ ("Movant"), moves this court for an order
18 terminating the automatic stay of 11 United States Code § 362 as to Movant, so that Movant may
19 commence and continue all acts necessary to enforce its security interest in real property generally
20 described as 1966 Arabian Ln, Gardnerville, Nevada 89410-7845.

21 /././

22
23
24
25
26
27 ¹ This Motion for Relief from Automatic Stay shall not constitute a waiver of the within party's right to
28 receive service pursuant to Fed. R. Civ. P. 4, made applicable to this proceeding by Fed. R. Bankr. P. 7004,
notwithstanding Pite Duncan, LLP's participation in this proceeding. Moreover, the within party does not authorize
Pite Duncan, LLP, either expressly or impliedly through Pite Duncan, LLP's participation in this proceeding, to act
as its agent for purposes of service under Fed. R. Bankr. P. 7004.

On or about December 14, 2010, Stephen Barry Fine and Leesa Ariel Brookman Fine ("Debtors") filed a voluntary petition under Chapter 7 of the Bankruptcy Code, and Keith J Tierney was appointed as Chapter 7 Trustee. As a result of said filing, certain acts and proceedings against Debtors and the bankruptcy estate are stayed as provided in 11 United States Code § 362.

Movant moves this court for relief from stay under 11 United States Code §§ 362(d)(1) and 362(d)(2).

MEMORANDUM OF POINTS AND AUTHORITIES

I.

MOVANT IS ENTITLED TO RELIEF FROM THE AUTOMATIC STAY UNDER 11 UNITED STATES CODE § 362(d)(2).

NO EQUITY

11 United States Code § 362(d)(2) provides that relief from the automatic stay shall be granted if the debtor does not have any equity in the property and the property is not necessary to the debtor's effective reorganization.

In In re San Clemente Estates, 5 B.R. 605 (Bankr. S.D. Cal. 1980), the court stated that: § 362(d)(2) reflects congressional intent to allow creditors to immediately proceed against the property where the debtor has no equity and it is unnecessary to the reorganization, even where the debtor can provide adequate protection under § 362(d)(1). (Emphasis added).

Id. at 610 (emphasis added).

In In re Mikole Developers, Inc., 14 B.R. 524, 525 (Bankr. E.D. Pa. 1981), the court stated that in determining whether equity exists in the property for purposes of § 362(d)(2), all encumbrances are totaled, whether or not all the lienholders have joined in the request for relief from stay. The Ninth Circuit has concurred with this view in Stewart v. Gurley, 745 F.2d 1194 (9th Cir. 1984).

An appropriate cost of sale factor should also be added to determine if the debtor has any equity in the property. La Jolla Mortgage Fund v. Rancho El Cajon Associates, 18 B.R. 283, 289 (Bankr. S.D. Cal. 1982).

1 On or about April 25, 2008, Debtors, for valuable consideration, made, executed and
2 delivered to Movant a Note in the principal sum of \$385,000.00 (the "Note"). Pursuant to the Note,
3 Debtors are obligated to make monthly principal and interest payments commencing June 15, 2008,
4 and continuing until May 15, 2038, when all outstanding amounts are due and payable. The Note
5 provides that, in the event of default, the holder of the Note has the option of declaring all unpaid
6 sums immediately due and payable. A copy of the Note is attached hereto as exhibit A and
7 incorporated herein by reference.

8 On or about April 25, 2008, the Debtors made, executed and delivered to Movant a Deed of
9 Trust (the "Deed of Trust") granting Movant a security interest in real property commonly described
10 as 1966 Arabian Ln, Gardnerville, Nevada 89410-7845 (the "Real Property"), which is more fully
11 described in the Deed of Trust. The Deed of Trust provides that attorneys' fees and costs incurred as
12 a result of the Debtors' bankruptcy case may be included in the outstanding balance under the Note.
13 The Deed of Trust was recorded on May 1, 2008, in the Official Records of Douglas County, State
14 of Nevada. A copy of the Deed of Trust is attached hereto as exhibit B and incorporated herein by
15 reference.

16 On or about November 1, 2009, Wachovia Mortgage FSB converted to a national bank with
17 the name Wells Fargo Bank Southwest, National Association. Additionally, effective November 1,
18 2009, Wells Fargo Bank Southwest, National Association merged with Wells Fargo Bank, National
19 Association. A copy of the official certification of the Comptroller of the Currency of the
20 conversion of Wachovia Mortgage FSB and the merger of Wells Fargo Bank Southwest, National
21 Association is attached hereto as exhibit C and incorporated herein by reference.

22 The obligation under the Note is in default as of October 15, 2009, for failure to make
23 payments to Movant. As of January 10, 2011, the total obligation due and owing under the Note is in
24 the approximate amount of \$410,818.87, representing the principal balance in the amount of
25 \$388,272.32, interest in the sum of \$16,319.41, escrow advances in the amount of \$3,641.34, a
26 recoverable balance in the amount of \$2,571.80, consisting of foreclosure fees in the amount of
27 \$2,551.80 and property inspections in the amount of \$20.00, and recording fees in the amount of
28 \$14.00. This is an approximate amount for purposes of this Motion only, and should not be relied

upon as such to pay off the subject loan as interest and additional advances may come due subsequent to the filing of the Motion. An exact payoff amount can be obtained by contacting Movant's counsel. Further, Movant has incurred additional post-petition attorneys' fees and costs in bringing the instant Motion. Moreover, the total arrears under the Note are in the approximate sum of \$33,271.24, excluding the post-petition attorneys' fees and costs incurred in filing the instant Motion.

II.

RELIEF FROM STAY

LACK OF EQUITY

Movant is informed and believes that, based on the Debtors' bankruptcy Schedules and Statements, the fair market value of the Property is approximately \$270,000.00. True and correct copies of the Debtors' bankruptcy Schedules "A" and "D" are collectively attached hereto as exhibit D and incorporated herein by reference.

Based on the above, Movant maintains that the equity in the Property is as follows:

Fair Market Value:	\$270,000.00
Less:	
Movant's Deed of Trust	\$410,818.87
Costs of Sale (8%)	<u>\$21,600.00</u>
Equity in the Property:	\$<162,418.87>

As a result, there is no equity in the Property for the bankruptcy estate. Moreover, since this is a Chapter 7 proceeding, there is no reorganization in prospect. As a result, Movant is entitled to relief from the automatic stay pursuant to 11 United States Code § 362(d)(2).

Debtors' Statement of Intent indicates it is the intent of the Debtors to surrender the Real Property in full satisfaction of Movant's secured claim. A true and correct copy of the Debtors' Statement of Intent is attached hereto as exhibit E and incorporated herein by reference.

III.

MOVANT IS ENTITLED TO RELIEF FROM THE AUTOMATIC STAY UNDER 11 UNITED STATES CODE § 362(d)(1).

CAUSE - LACK OF ADEQUATE PROTECTION

Pursuant to the provisions of 11 United States Code §§ 361 and 362(d)(1), Movant is entitled

1 to adequate protection of its interest in the Property.

2 Movant submits that adequate protection in this case requires normal and periodic cash
3 payments, as called for by the Note, plus the repayment of any and all delinquent amounts owed to
4 Movant, including all attorneys' fees and costs incurred in the filing of this motion.

5 Movant is informed and believes that Debtors are presently unwilling or unable to provide
6 adequate protection to the Movant and there is no probability that adequate protection can be
7 afforded to Movant within a reasonable time.

8 By reason of the foregoing, Movant is entitled to relief from stay under 11 United States
9 Code § 362(d)(1), based upon the failure of Debtors to provide adequate protection to Movant.

10 Pursuant to Local Rule 9014(g), a proposed order is attached hereto as exhibit F.

11 WHEREFORE, Movant respectfully prays for an Order of this court as follows:

12 1. Terminating the automatic stay of 11 United States Code § 362, as it applies to the
13 enforcement by Movant of all of its rights in the Real Property under the Note and the Deed of Trust;

14 2. That the 14-day stay described by Bankruptcy Rule 4001(a)(3) be waived;

15 3. Granting Movant leave to foreclose on the Real Property and to enforce the security
16 interest under the Note and the Deed of Trust, including any action necessary to obtain possession of
17 the Property;

18 4. Permitting Movant to offer and provide Debtors with information re: a potential
19 Forbearance Agreement, Loan Modification, Refinance Agreement, or other Loan Workout/Loss
20 Mitigation Agreement, and to enter into such agreement with Debtors;

21 5. Alternatively, in the event this court declines to grant Movant the relief requested
22 above, Movant requests that an Order for adequate protection be issued, requiring the Debtors to
23 reinstate and maintain in a current condition all obligations due under the Note and Deed of Trust
24 and all other deeds of trust encumbering the Real Property, including Debtors' obligations to pay
25 when due (a) the monthly installments of principal and interest, as required under the Note;
26 (b) tax/insurance obligations; and (c) any sums advanced by Movant on behalf of Debtors in order to
27 protect Movant's interest in the Real Property, including all attorneys' fees and costs incurred in the
28 filing of this motion;

1 //.

2 6. That the attorneys' fees and costs incurred by Movant for filing the instant Motion be
3 included in the outstanding balance of the Note as allowed under applicable non-bankruptcy law;

4 7. That the requirements of Local Rule 9021 be waived; and

5 8. For such other and further relief as the court deems just and proper.

6
7 Dated: January 31, 2011

8 /s/ MATTHEW M. MCARTHUR
9 4375 Jutland Drive, Suite 200
10 P.O. Box 17933
11 San Diego, CA 92177-0933
12 (858) 750-7600
13 NV Bar #11649
14 Attorney for WELLS FARGO
15 BANK, N.A. ALSO KNOWN AS
16 WACHOVIA MORTGAGE, A
17 DIVISION OF WELLS FARGO
18 BANK, N.A, AND FORMERLY
19 KNOWN AS WACHOVIA
20 MORTGAGE FSB
21
22
23
24
25
26
27
28